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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARCUS DEON TYLER, Defendant and Appellant.	E071094 (Super.Ct.No. RIF1801737) OPINION

APPEAL from the Superior Court of Riverside County. Jorge C. Hernandez, Judge. Affirmed in part, reversed in part, and remanded with directions.

Robert F. Somers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Melissa Mandel and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marcus Deon Tyler resisted correctional officers' efforts to remove him from a holding cell. This led to what the trial court called a "dog pile[]" on the cell floor. By the time the dust settled, defendant had bitten two of the officers.

A jury found defendant guilty of battery on a custodial officer with injury (Pen. Code, § 243, subd. (c)(1), count 2) and attempted battery on a peace officer with injury (Pen. Code, §§ 243, subd. (c)(2), 664, count 3). It hung on a charge of resisting an executive officer by force or violence (Pen. Code, § 69, subd. (a), count 1), which was dismissed.

In a bifurcated proceeding, the same jury found one strike prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and one prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) to be true.

Defendant was sentenced to a total of three years four months in prison, along with the usual fees, fines, and miscellaneous orders.

Defendant now contends:

1. There was insufficient evidence that defendant caused an "injury" to support his conviction for battery on a custodial officer with injury.

2. The trial court was not aware that it had discretion to sentence concurrently rather than consecutively.

3. The trial court was not aware that it had discretion to strike the strike prior on its own motion.

4. Defense counsel rendered ineffective assistance by failing to move to strike the strike prior.

We agree that the record indicates that the trial court was unaware of its discretion to sentence concurrently. Otherwise, we find no error. Accordingly, we will affirm the conviction but reverse the sentence and remand for resentencing.

I

FACTUAL BACKGROUND

On October 8, 2017, defendant was in the process of being booked into jail. When an officer tried to transfer him from a holding cell to a housing cell, defendant failed to obey the officer's orders.

Two officers entered the cell; they tried to grab defendant's arms to walk him out, but he held his arms up against his chest and tried to pull away from them. He fell to the ground but continued to resist by "thrashing around," kicking, and trying to bite the officers.

The officers who testified all agreed that defendant had "incredible strength." He seemed insensible to pain. Ultimately, a total of six officers became involved in the struggle, and together they managed to restrain defendant.

During the struggle, defendant bit the hand of Deputy Mario Chappell, a sworn peace officer. The bite did not break the skin, but it caused some swelling and bruising.

Defendant also bit the hand of Deputy Gabriel Lopez, , an unsworn correctional officer. The bite broke the skin and left a mark.

Deputy Lopez wanted to have the bite "checked out," in case of infection. He went to the jail's nursing staff. They did a "quick wash and wipe down." They also suggested that he go to the hospital, as a precaution against any communicable diseases.

He duly went to a hospital emergency room, where Dr. John Naftel examined him.[1] Dr. Naftel described the bite mark as an abrasion, rather than a laceration, meaning that it did not go through all the layers of the skin. The bite was washed again, with soap and water and a sterile solution. Because it did not go all the way through the skin, it did not require antibiotics. Dr. Naftel testified, however, that a viral infection, such as hepatitis or HIV, is "relatively easily transmitted by saliva . . . ."

In addition, Deputy Lopez's blood was drawn, to determine whether he had any preexisting infection and/or "to test it against the defendant's blood."

In Dr. Naftel's opinion, Deputy Lopez's wound was "something that . . . a medical professional would want to look into," "[b]ecause it can affect the individual's health going forward."

The bite healed, without any permanent effects.

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[1] Officer Lopez and Dr. Naftel did not testify in so many words that their encounter took place in an emergency room. However, Dr. Naftel testified that he is an emergency physician and practices emergency medicine exclusively. Moreover, he saw Officer Lopez "shortly" after the altercation. The only reasonable conclusion is that Officer Lopez went to the emergency room.

II

THE SUFFICIENCY OF THE EVIDENCE THAT DEPUTY LOPEZ'S INJURY REQUIRED PROFESSIONAL MEDICAL TREATMENT

Defendant contends that, with respect to count 2, there was insufficient evidence that Deputy Lopez suffered an injury that required professional medical treatment.

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Count 2 charged battery on a peace officer with injury (Pen. Code, §§ 243, subd. (c)(2), 664) with regard to Deputy Lopez. For purposes of this crime, "'[i]njury'" is

defined as "any physical injury which requires professional medical treatment." (Pen. Code, § 243, subd. (f)(5).)[2]

"' . . . It is the nature, extent, and seriousness of the injury — not the inclination or disinclination of the victim to seek medical treatment — which is determinative. A[n] . . . officer who obtains "medical treatment" when none is required, has *not* sustained an "injury" within the meaning of section 243, subdivision (c). And a[n] . . . officer who does *not* obtain "medical treatment" when such treatment is required, has sustained an "injury" within the meaning of section 243, subdivision (c). The test is objective and factual.' [Citation.]" (*In re D.W.* (2015) 236 Cal.App.4th 313, 324.)

There is a fairly compact body of case law concerning the sufficiency of the evidence that an injury required professional medical treatment — i.e., that an injury was an "injury." As we will discuss, the facts in this case fall somewhere in between those cases finding the evidence sufficient and those finding it insufficient.

We begin with cases finding sufficient evidence.

In *People v. Longoria* (1995) 34 Cal.App.4th 12, the handcuffed defendant kicked an officer in the groin, causing him to fall to his knees. The defendant also fell on the officer, pinning his hand to the floor with the handcuffs. (*Id.* at p. 15.) "[T]he fingers and bottom side of [the officer's] right hand were cut, and his hand was crushed . . . ."

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[2] We will use injury, without quotation marks, to mean an injury in the dictionary sense, and "injury," in quotation marks, to mean an injury in this technical legal sense.

(*Id*. at p. 18.) He sought medical attention. A doctor x-rayed his hand, but found no broken bones. The doctor also "'advised [the officer] what to do'" about his groin injury. The cuts prevented the officer from holding a firearm. He was placed on restricted duty, answering phones, "for three to five days." (*Id*. at p. 15.) The appellate court held that this was sufficient evidence of an "injury." (*Id*. at pp. 16-18.)

In *People v. Lara* (1994) 30 Cal.App.4th 658, the defendant struggled with the officer, hitting and kicking him. (*Id*. at p. 664.) As a result, the officer sustained bruises to both knees as well as "numerous cuts and abrasions on his hands." (*Id*. at p. 667.) The officer was also exposed to the defendant's blood. (*Ibid*.) The officer went to an emergency room, where medical personnel cleaned his wounds and "treated" his bruises; they also checked for ligament damage. (*Ibid*.)

The appellate court held that there was sufficient evidence of an "injury." (*People v. Lara*, *supra*, 30 Cal.App.4th at pp. 667-668.) It rejected the defendant's argument that "an injury is not something that 'can be cured or alleviated with common household remedies, with self-help or by doing nothing' but must be 'sufficiently severe a physician would recommend or perform affirmative acts in intervention, such as minor surgery, suturing, skin grafts, administration of prescription medicines or the like.'" (*Id*. at p. 667.) It stated: "[W]here, as here, it is undisputed that the officer/victim suffered injuries that were, in fact, treated by professional medical personnel at an emergency room, there is sufficient evidence to support a finding that he suffered an 'injury' . . . ." (*Id*. at pp. 667-668.)

Turning to cases finding insufficient evidence, there is only one: *In re Michael P.* (1996) 50 Cal.App.4th 1525. There, a juvenile was handcuffed in a van being driven by a probation officer. (*Id.* at p. 1527.) He started kicking both the officer and the steering wheel. (*Id.* at pp. 1527-1528.) The officer was struck in the chest and chin. He was sore but not bruised. He did not seek medical attention. (*Id.* at p. 1528.)

The appellate court contrasted the case before it with *Longoria*, where "the officer . . . testified in detail about the seriousness of the injury." (*In re Michael P.*, *supra,* 50 Cal.App.4th at p. 1530.) It concluded that the officer's "failure to further describe his injuries is fatal" to the conviction. (*Id.* at p. 1529.) "In the absence of some further detail about [the officer's] soreness, . . . the evidence of injury is insufficient to support the . . . finding of a battery with injury on a peace officer . . . ." (*Id.* at p. 1530.)

Defendant cites *People v. Hayes* (2006) 142 Cal.App.4th 175, but it does not support his argument. In *Hayes*, the defendant kicked over a 50-pound concrete ashtray; it hit an officer on the shin, causing a "laceration" approximately four inches long. (*Id.* at p. 179.) The officer did not seek medical treatment; his leg was sore for "several days," and the wound healed in a week. (*Ibid.*)

The appellate court held that there was substantial evidence of battery on a probation officer *without* "injury," and therefore the trial court erred by failing to instruct on this lesser included offense. (*People v. Hayes*, *supra,* 142 Cal.App.4th at pp. 180-182.) It further held that the error was not harmless: "It appears to us, as it seems to have also appeared to [the officer], that the injury was not severe enough to require

professional medical treatment." (*Id*. at p. 183.) The court, however, did not hold that there was insufficient evidence of an "injury." Quite the contrary, it allowed a retrial (*id*. at p. 184), which necessarily implied that there *was* sufficient evidence. (See *Burks v. United States* (1978) 437 U.S. 1, 18 [double jeopardy bars retrial of a conviction that has been reversed based on insufficiency of the evidence].)

Defendant also cites *In re D.W., supra,* 236 Cal.App.4th 313. There, the minor spit in an officer's eye. (*Id*. at p. 319.) The officer went to a hospital, where medical personnel carried out numerous tests, but ultimately did not administer any treatment. (*Id*. at pp. 319-320.) The appellate court held that, by spitting in the officer's eye, the defendant did not cause any injury at all; hence, the fact that the officer sought, obtained, or even required medical care was irrelevant. (*Id*. at pp. 324-327.) Here, it is indisputable that defendant did cause an injury in the dictionary sense.

Deputy Lopez's injury was less severe than the injuries in *Longoria*, *Lara*, or *Hayes*. Nevertheless, this case resembles *Lara*, in two significant ways — Deputy Lopez had broken skin that was exposed to the defendant's bodily fluids, and he went to a hospital, even though he received no treatment there other than testing and hygienic cleansing. *Lara*'s statement that the evidence is sufficient if it shows injuries "that were, in fact, treated by professional medical personnel at an emergency room" is controlling here. (*People v. Lara, supra,* 30 Cal.App.4th at pp. 667-668.) Moreover, Dr. Naftel testified that, in his expert opinion, Deputy Lopez's wound required medical treatment because of the possibility of infection.

On the other hand, *Michael P*. is not controlling, because there the officer had no broken skin — much less broken skin exposed to bodily fluids — and did not seek any medical treatment. Moreover, *Michael P.* found insufficient evidence mainly because the officer failed to provide any details about his injury, other than that he was sore. Here, Deputy Lopez and Dr. Naftel, between them, did provide the necessary details.

In sum, a rational trier of fact could have found that Deputy Lopez's injury required professional medical treatment.

III

SENTENCING ISSUES

A. *Additional Factual and Procedural Background*.

At sentencing, the trial court commented:

"It seems to me that if the officer had just waited five more minutes in order to give the defendant the opportunity — because it seemed that he was attempting to comply, but he just wasn't getting it. If he had waited five more minutes, I don't think there would have been this mel[é]e.

"But once he put his hands on the defendant, in order to direct him out of the cell there, that's when things started going bad for [defendant]. It started going bad because he pulled back. He resisted. And he used force to try to get away from the officer. And then when the other ones dog piled on him, . . . he instead of complying made it even worse by trying to bite several of them."

It also stated:

"I think dog piling on him wasn't the smartest thing that should've been done by these people. How many people does it take? How many big burly people does it take to handle this skinny young man? But again he set the tone for that. He set those things into action."

Regarding its sentencing options, it stated:

"I don't see that I have enough in order to bust these down to misdemeanors[,] although I considered it. Believe me I considered it. . . . I wrestled with it.

"The other thought was should I grant him probation . . . ? But I can't do that in the absence of a *Romero*. So what I'm left with is it's felony conduct. So my thoughts are based upon that I would give him the bare minimum possible that I can by law because I don't think they're misdemeanors. But I can't do anything more than giving him the bare minimum that I am allowed to by law."

It proceeded to sentence defendant on count 2 to two years eight months (the low term, doubled), and on count 3 to eight months (one-third the midterm, doubled), to be served consecutively, for a total of 40 months. It struck the punishment on the prior prison term enhancement, explaining: "I think the 40 months is more than adequate punishment for the offenses committed in Counts 2 and 3."

B. *Legal Background*.

"A failure to exercise discretion is an abuse of discretion. [Citation.]" (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.) Thus, a trial court abuses its discretion when it is not aware that it has discretion and it therefore fails to exercise it. (See *People v.*

Carmony (2004) 33 Cal.4th 367, 378; *People v. Keelen* (1998) 62 Cal.App.4th 813, 819-820.)

However, "in light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of that discretion. [Citations.]" (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527.)

C. *The Possibility of Concurrent Sentencing*.

Defendant contends that the trial court was not aware that it had discretion to run the sentences concurrently rather than consecutively.

Preliminarily, the People argue that defense counsel forfeited this contention by failing to object below. The case law is in conflict as to whether a claim of failure to exercise sentencing discretion can be forfeited. (See *People v. Leon* (2016) 243 Cal.App.4th 1003, 1023 ["may[be]" no forfeiture]; *In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182 [no forfeiture]; but see *People v. Weddington* (2016) 246 Cal.App.4th 468, 491 [forfeiture]; *People v. Kendrick* (2014) 226 Cal.App.4th 769, 778 [forfeiture].) In any event, under the circumstances here, if defendant is correct, there could be no satisfactory explanation for his trial counsel's failure to raise the issue below, which would therefore constitute ineffective assistance of counsel. (See generally *People v. Bell* (2019) 7 Cal.5th 70, 125-126.)

Here, the trial court did have discretion to sentence concurrently. (Pen. Code, § 669, subd. (a).) Because defendant had one strike prior, the trial court would have been required to sentence consecutively if the crimes were not committed on the same occasion or did not arise from the same set of operative facts. (Pen. Code, § 667, subd. (c)(6).) However, they were committed on the same occasion and they did arise from the same set of operative facts; both bitings were part of a continuous struggle with multiple officers simultaneously.

As defendant notes, the trial court repeatedly said it was going to sentence him to the "bare minimum." However, it could have imposed an even lower sentence by sentencing concurrently. Thus, this comment indicates that it did not realize that it had discretion to do so. The probation report had recommended consecutive sentencing, but had not explained why; it had not analyzed the relevant factors. (See Cal. Rules of Court, rule 4.425.) Defense counsel did not file a sentencing memorandum and did not address concurrent versus consecutive sentencing at the sentencing hearing.

The People argue, "The court discussed all of its options, including reducing the charges to misdemeanors and striking the sentence on one of appellant's prior convictions (which it did on its own motion), it discussed the facts of appellant's crimes and appellant's criminal history, and then decided on a sentence it believed to be a fair and just punishment." But the very fact that, in this otherwise comprehensive discussion, it

did not mention or consider concurrent sentencing actually supports defendant's contention.[3]

Thus, the record satisfactorily establishes that the trial court was unaware of its discretion to sentence concurrently. We cannot say that concurrent sentencing would have been an abuse of discretion; the fact that the crimes were all committed in close spatial and temporal proximity and pursuant to defendant's objective of resisting weighed in favor of concurrent sentencing. (Cal. Rules of Court, rule 4.425(a)(1), (a)(3).)

At the same time, we do not mean to say that concurrent sentencing was required. It was not. We will remand to give the trial court an opportunity to exercise its discretion. We express no view on how it should exercise that discretion.

D. *The Possibility of Striking the Strike Prior*.

Defendant also contends that the trial court was not aware that it had discretion to strike the strike prior on its own motion. Alternatively, he argues that his trial counsel was ineffective in failing to move to strike the strike prior.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the Supreme Court held that a trial court has discretion to strike a strike prior under Penal Code section 1385, on its own motion. (*Id*. at pp. 504, 529-530.)

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[3] The trial court erred by falling to state reasons for sentencing consecutively. (Cal. Rules of Court, rule 4.406(b)(5).) Defense counsel forfeited this error by failing to object. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) However, the court's failure to state reasons is a further indication that it was not aware that consecutive sentencing was a discretionary sentencing decision.

In ruling on a defendant's request to strike a strike prior, "the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strike Law]'s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, defendant seizes on the trial court's statement it could not grant probation "in the absence of a *Romero*." He concludes that it was unaware that it had discretion to strike the strike prior on its own motion — it must have believed that defendant had to bring a *Romero* motion.

That is not how we understand the trial court's comment. Significantly, *Romero* itself dealt with the court's power to act on its own motion. Thus, we understand its reference to *Romero* to mean that it could not grant probation unless there were *grounds* to strike the strike prior — *either* on defendant's motion *or* on the court's own motion — and it found none.

The record supports such reasoning. In addition to the strike prior, defendant had numerous prior convictions, including convictions for sale or transportation of drugs (Health & Saf. Code, § 11352, subd. (a)), as a felony, and robbery (Pen. Code, § 211), as a felony. He also had three other pending cases. He was on parole when he committed the crimes. He was 28 and had not been employed since he was 18.

In this appeal, the only grounds that defendant suggests for a *Romero* motion are "the mitigated nature of the crimes and the severity of the sentence." The trial court, however, took the mitigated nature of the crimes into account, by giving defendant the low term on count 2 and by striking the prior prison term enhancement. Once that was done, the sentence was by no means severe.

Because the grounds for a *Romero* motion were thin, and because the trial court indicated that it would not grant a *Romero* motion, we also conclude that defense counsel did not render ineffective assistance by failing to make such a motion.

Accordingly, we would not reverse defendant's sentence on these grounds. However, we are reversing on other grounds and remanding for resentencing. (See part III.C, *ante*.) Nothing we say in this part is intended to preclude the trial court from considering on remand whether to strike the strike prior.

IV

DISPOSITION

The conviction is affirmed; the sentence is reversed. The trial court is directed to resentence defendant on remand.

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RAMIREZ
P. J.

We concur:

SLOUGH
J.

FIELDS
J.